No. 57

Supreme Court of the United States

COURTNEY M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, NORTON MOCKRIDGE, GEORGE S. TROW and WILLIAM L. O'DONOVAN,
Petitioners,

against

WHITE PLAINS PUBLISHING COMPANY, INC.,
Respondent.

PETITIONERS' REPLY BRIEF.

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STEPHEN R. J. ROACH,
On the Brief.

THE REPORTER COMPANY, Inc., Walton, N. Y.
1945

Cases Cited.

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PETITIONERS' REPLY BRIEF.

The respondent, White Plains Publishing Company, Inc., in its brief has enlarged the questions beyond that included in the petition for certiorari.

The petitioners, in applying to the Court for certiorari, presented only the following questions for review (Petition for Certiorari, p. 14).

> "1. Was the respondent* engaged in interstate commerce, or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938 during the period alleged in the complaint?
>
> "2. Was the Court below correct in refusing to consider all the interstate activity of the respondent proved except the actual mailing of the product each day to the 45 out-of-state subscribers in determining the question of interstate commerce?
>
> "3. Was the doctrine of *de minimis non curat lex* applicable under the Fair Labor Standards Act and under the facts of this case?"

* "If the respondent is held so engaged then each employee engaged in that process or in production of goods for such commerce is so engaged. Kirschbaum v. Walling, 316 U. S. 517."

The respondent advances the following points in its brief before this Court:

> "Point I. Respondent was not engaged in commerce or in the production of goods for commerce and none of petitioners was engaged in commerce or in any process or occupation necessary to the production of goods for commerce.
>
> "Point II. No credence should be given to petitioners' claims which bear every earmark of an afterthought manufacture for the occasion.
>
> "Point III. The recoveries granted by the Trial Court should not be reinstated because the computation of overtime was incorrect.
>
> "Point IV. The Act contains a particular form abridgment of the constitutional guaranty of a free press.
>
> "Point V. Application of Sections 6 and 7 of the Act to respondent's business would constitute an unreasonable, arbitrary and injurious discrimination against respondent in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution, in conflict with the principles announced in *Grosjean v. American Press Co.*, 297 U. S. 233 (1936).
>
> "Point VI. Petitioners were exempt from the provisions of the Act herein as professional employees within the meaning of Section 13 (a) (1)."

Since only Point I urged by the respondent is to be reviewed by this Court under the writ granted, we shall briefly reply thereto.

On page 16 of its brief the respondent states:

> "The record is undisputed that in the publication of a daily newspaper no news stories or features are disseminated to readers exactly as they reach the office."

This statement evidently was made in support of respondent's contention that the news items or features received by the respondent newspaper came to a rest after their interstate journey and that a new article thereafter was sent into commerce. The record, however, is not in agreement with the respondent's statement (Testimony of Walter V. Hogan, Editor and an Executive Officer of the Respondent, R., p. 71).

> "Q. The news stories, as you take them off the teletype machine, do you print them as you take them off in the same form? A. Practically.
> "Q. Are there some stories that are taken off and changed? A. Occasionally.
> "Q. They are headed? A. Some.
> "Q. Headed? A. Yes."

It is the petitioners' contention that whatever pause occurred in the transmission of the news items or features from the interstate sources to the reader, such pause was temporary and under the doctrine of *Walling v. Jacksonville Paper Company,* 317 U. S. 564, a temporary pause does not mean that they are no longer "in commerce" within the meaning of the Act (see Petitioners' main brief, p. 16).

On page 18 of its brief the respondent quotes from *Schroepfer against A. S. Abel Co.,* 138 Fed. 2nd 111, cert. denied January 17th, 1944, and disputes the petitioners' contention that coverage was denied in that case because the employees therein involved were not employees of the newspaper in question. The respondent continues to state that the Circuit Court, even assuming the petitioners there were employees of the newspaper, held they were not engaged in commerce when they sold the paper on the streets of Baltimore. What the Circuit Court actually said in this respect is as follows (p. 112):

> "Whether upon these facts plaintiffs were employees of defendant within the meaning of the Act, is a question not free from difficulty (Cf. *Southern R. Co. v. Black*, 4 Cir. 127 F. 2d 280 [5 WHR 298]), but it is one which it is not necessary for us to decide, since we are of opinion that, even if considered employees of defendant, plaintiffs were not engaged in commerce within the meaning of the Act. *They had nothing to do with collecting news, assembling it, printing the paper, or any other activity in which interstate commerce was involved. Their only duties related to the retail sale of papers, or delivery thereof for retail sale, in the City of Baltimore.*" (Italics ours.)

On the contrary, the petitioners in the case at bar had everything to do with collecting news, assembling it and printing the papers and the other activities in which interstate commerce was involved.

The respondent's Point II is as follows:

> "No credence should be given to petitioners' claims which bear every earmark of an afterthought manufacture for the occasion."

No reply to this point is necessary since it is not at issue for review before this Court. However, the Trial Court, who heard the case without a jury, with the consent of all parties, found that the petitioners' claim was "sustained by credible evidence" (R. 89), and that "evidence upon the trial established that each of the plaintiffs was employed in producing and working on such goods in a process and occupation necessary to the production thereof, * * *" (R. 89).

The Trial Court resolved the question of credibility against the respondent (R. 91), concluding (R. 92) "in the absence of substantial or detailed contradictory evidence the Court must and does find by a fair prepon-

derance of the believable evidence that the plaintiffs did perform services for the defendant beyond the prescribed hours of designated work weeks and that the minimum overtime hours as claimed were actually spent in the course of their employment."

The respondent urges as Point III:

> "The recoveries granted by the Trial Court should not be reinstated because the computation of overtime was incorrect."

This issue is not before the Court. However the application of the rule in *Brooklyn Savings Bank against O'Neill* and *Overnight Transportation Co. against Missell*, can be adequately handled by the Courts below when the case is remanded to them to proceed according to the opinion of this Court.

The respondent urges as Points IV and V:

> "The Act Contains a Particular Form of Abridgment of the Constitutional Guaranty of a Free Press."
>
> "Application of Sections 6 and 7 of the Act to respondent's business would constitute an unreasonable, arbitrary and injurious discrimination against respondent in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution, in conflict with the principles announced in *Grosjean v. American Press Co., supra.*"

These issues were not determined by the Appellate Courts below and hence cannot be raised in this Court. However, they have been answered in this Court by the Administrator of the Wage and Hour Division of the Department of Labor in Nos. 61 and 63 this term (*Oklahoma Press Publishing Co., etc.*) and we repeat the Administrator's argument (pp. 42-45):

> "It is well settled by the decisions of this Court that the press as such is not immune from

the application of general laws. In the light of the opinions of all the Justices in *Associated Press v. United States*, Nos. 57, 58, 59, October Term, 1944, confirming the view which was taken in *Associated Press v. National Labor Relations Board*, 301 U. S. 103, repetition of the argument in support of this proposition is superfluous.

"Petitioners [respondents here] argue that application of the Fair Labor Standards Act to newspapers will increase their cost of doing business and hence amounts to a restriction of freedom of the press. The fact that the cost of doing business is increased by application of the Act no more infringes the guaranty of the First Amendment than does the increased cost of doing business which is entailed by the imposition of property and income taxes upon newspapers. The freedom of the press is not abridged by protection of the employees of newspapers from working under substandard labor conditions. The First Amendment is not a guaranty of profits. The regulation here does not 'trespass upon the domains set apart for free speech' (*Thomas v. Collins*, 323 U. S. 516, 532) any more than do safety and sanitary laws, zoning ordinances, or wartime allocation and priority controls. There is here no attempt at a 'guardianship of the public mind' such as was involved in *Largent v. Texas*, 318 U. S. 418, or any form of censorship or previous restraint of discussion condemned in *Bridges v. California*, 314 U. S. 252; *Cantwell v. Connecticut*, 310 U. S. 296; *Thornhill v. Alabama*, 310 U. S. 88; *Schneider v. State*, 308 U. S. 147; *Hague v. C. I. O.*, 307 U. S. 496; *Lovell v. Griffin*, 303 U. S. 444; or *Near v. Minnesota*, 283 U. S. 697.

"Even though freedom of the press is 'in a preferred position' (*Murdock v. Pennsylvania*, 319 U. S. 105, 115; *Follett v. McCormick*, 321 U. S. 573), the press is not free from all regulatory measures. Although a license tax on the right to distribute books and pamphlets may be invalid as a direct

restriction of circulation and as a restraint equally obnoxious to that imposed by censorship or previous restraint, the Fair Labor Standards Act is neither a tax nor a direct restraint. The preferred position to which the press is entitled is based on its function as a medium of public information. Insofar as a newspaper is a business for profit it is not entitled to immunity from the public policies applicable to other businesses, such as those embodied in the National Labor Relations Act and the Fair Labor Standards Act.

"The final argument that the exemption of certain weekly newspapers of local circulation by Section 13 (a) (8) of the Act is a discriminatory classification which invalidates the application of Sections 6 and 7 to the petitioners [respondents here] is plainly without substance. This Court has pointed out time and again that the Fifth Amendment does not require the full and uniform exercise of the commerce power and that Congress may weigh relative needs and limit the application of particular legislative policies. *Steward Mach. Co. v. Davis*, 301 U. S. 548; *Currin v. Wallace*, 306 U. S. 1. See also *Sun Publishing Co. v. Walling*, 140 F. 2d 445, 448 (C. C. A. 6), certiorari denied, 322 U. S. 728. The discriminatory tax involved in *Grosjean v. American Press*, 297 U. S. 233, 250-251, was held invalid because it was found to be a 'deliberate and calculated device' to penalize 'a selected group of newspapers.' This Court has never suggested that either the First or the Fifth Amendment requires Congress to regulate or tax all sources of public information alike or not at all."

The respondent, as its last point urges:

"Petitioners were exempt from the provisions of the Act herein as professional employees within the meaning of Section 13 (a) (1)."

This question is not before this Court and was decided against the respondent by the Trial Court (R. 92) and not reviewed by either the Appellate Division or the Court of Appeals since they did not reach the question of defenses, having found initially that neither the petitioners nor the respondent were engaged in commerce within the meaning of the Act.

The respondent on page 5 of its brief repeats the spurious argument made to the New York Court of Appeals, to wit:

> "The judgment when reduced to dollars and cents imposed a burden of 1.12½ on each copy of respondent's newspaper sent outside of the State of New York during the period in controversy whereas the price actually paid by subscribers for those newspapers was 2¢ per copy."

It is well known that newspapers do not depend upon the price paid for a copy for support of the enterprise, nor is the respondent correct, as a matter of bookkeeping, in attempting to charge each out of state copy with a pro rated amount. The basis costs of a newspaper are the same whether one copy or ten thousand copies are printed and there is very little added to this basic cost by the increase in the number of copies. And as the Wage and Hour Administrator has observed (Defendant's Exhibit A, R. 88, p. 11 thereof), the bulk of the income of a daily newspaper is from advertising (about 75%).

Hence, the above argument of the respondent proves nothing.

It is, therefore, respectfully submitted that the judgment of the New York Appellate Courts below be re-

versed and that the relief as prayed for in the petitioners' main brief be granted.

Respectfully submitted,

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